Kanagasavey a/l Sinayah v Public Prosecutor

HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NO 42–404–93
JEFFREY TAN JC
26 JANUARY 1995

Criminal Procedure *— Forfeiture — Dangerous drugs — Forfeiture of moneys in bank accounts — Claimant of property released by writ of habeas corpus — Whether claimant 'liable person' under s 7 of the Dangerous Drugs (Forfeiture of Property) Act 1988 — Dangerous Drugs (Forfeiture of Property) Act 1988 ss 7 & 32(2)*

Evidence *— Presumption — Illegal property — Moneys in bank accounts forfeited under Dangerous Drugs (Forfeiture of Property) Act 1988 — Whether court must presume property is illegal and owner is liable — Dangerous Drugs (Forfeiture of Property) Act 1988 s 35*

Statutory Interpretation *— Construction of statutes — Penal statutes — Legislative intent to be given effect to — Whether statute should be construed narrowly where language clear and unambiguous — Whether judicial interpretation excluded — Dangerous Drugs (Forfeiture of Property) Act 1988 s 7(1)(a)(ii)*

The appellant was detained under the Dangerous Drugs (Special Preventive Measures) Act 1988 and the sum of RM7,500 held in two bank accounts of the appellant ('the property') was seized by the respondent under the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act'). The appellant was subsequently released by a writ of habeas corpus and claimed the property. The respondent referred the claim to the sessions court for its decision under s 32(2) of the Act. The sessions court held that the appellant had failed to rebut the presumptions under s 35 of the Act and the property was ordered to be forfeited. The appellant appealed, contending that his release from detention *ipso facto* rendered his detention void ab initio and not in accordance with law and excluded him as a liable person under the Act. The appellant further contended that the words 'is or was detained' in s 7(1)(a)(ii) of the Act means a lawful detention, and as the provisions for seizure are penal, s 7(1)(a)(ii) must be narrowly construed in his favour, therefore inviting the word 'lawful' to be read into s 7 of the Act.

Held, dismissing the appeal:

(1) The appellant's claim to the sessions court was regulated by s 35 of the Act. From the onset until the conclusion of proceedings under the Act, courts must presume that the person proceeded against is a liable person and that the property is illegal property, unless by admissible evidence cause to the contrary is shown, and the person proceeded against is required to rebut those presumptions on a balance of probabilities.

(2) Released by a writ of habeas corpus, ex facie, the appellant would not be 'a person lawfully detained'. However, that was not synonymous with not being a liable person. Section 7 of the Act identifies the categories of persons liable to be proceeded against and the words 'was detained' would include as a liable person a person detained but released without serving a term of detention or restriction, a person detained but released by a judicial order and a person detained but released after service of the full (or part) of detention or restriction, provided that that person was detained or restricted after the commencement of the Act under any law in respect of any activity relating to or involving the trafficking in any dangerous drug.

(3) Any reading or construction of s 7(1)(a)(ii) of the Act with the inclusion of the word 'lawful' would exclude the second category above and give it a narrower meaning. The language in s 34 of the Act is both clear and unambiguous in that in proceedings under the Act, the Act must be construed to give effect to its intent. It is explicit that judicial interpretation or any other construction is excluded save as to give effect to the purposes of the Act.

(4) Having identified a person liable to be proceeded against as one who is currently detained or who in the past was detained, the legality of detention as *de rigueur* would not only be judicial interpretation against the purpose of the Act, but would also take into account the ambiguities or infirmities of language, or defect or deficiencies in s 7(1)(a)(ii). That plainly is not allowed, for the Act gives the courts very little discretion to rely on its own interpretation in administering its terms.

[Bahasa Malaysia summary

Perayu telah ditahan di bawah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1988 dan jumlah sebanyak RM7,500 yang disimpan dalam dua akaun bank perayu ('harta itu') telah disita oleh responden di bawah Akta Dadah Berbahaya (Perlucuthakan Harta) 1988 ('Akta itu'). Perayu kemudiannya telah dilepaskan melalui suatu writ habeas corpus dan menuntut harta itu. Responden telah merujukkan tuntutan itu kepada mahkamah sesyen untuk keputusannya di bawah s 32(2) Akta itu. Mahkamah sesyen telah memutuskan bahawa perayu telah gagal mematahkan anggapan di bawah s 35 Akta itu dan harta itu diperintah untuk diperlucuthakkan. Perayu telah membuat rayuan, menegaskan bahawa pelepasannya daripada tahanan, secara *ipso facto* menyebabkan tahanannya tidak sah ab initio dan tidak selaras dengan undang-undang dan tidak termasuknya sebagai orang yang berliabiliti di bawah Akta itu. Perayu menegaskan selanjutnya bahawa perkataan-perkataan 'yang ditahan atau telah ditahan' di dalam s 7(1)(a)(ii) Akta itu bermakna tahanan

sah, dan memandangkan peruntukan untuk perlucuthakan adalah bersifat penal, s 7(1)(a)(ii) perlu ditafsirkan secara terhad dengan memihak kepadanya, dan dengan itu menarik perkataan 'sah' untuk dibaca ke dalam s 7 Akta itu.

Diputuskan, menolak rayuan itu:

(1) Tuntutan perayu kepada mahkamah sesyen adalah dikawalselia oleh s 35 Akta itu. Dari permulaan hingga penamatan prosiding di bawah Akta itu, mahkamah perlu menganggap bahawa orang terhadap mana tindakan itu dibawa adalah seorang yang berliabiliti dan bahawa harta itu adalah harta yang haram, kecuali jika sebab sebaliknya boleh ditunjukkan dengan keterangan boleh terima, dan orang terhadap mana tindakan itu dibawa perlu mematahkan anggapan tersebut atas imbangan kebarangkalian.

(2) Walaupun perayu telah dilepaskan melalui writ habeas corpus, secara ex facie, beliau tidak akan menjadi 'seorang yang ditahan secara sah'. Walau bagaimanapun, itu tidak boleh disinonimkan dengan tidak menjadi seorang yang berliabiliti. Seksyen 7 mengenal pasti kategori orang-orang yang berliabiliti untuk ditindak terhadap dan perkataan 'telah ditahan' akan termasuk sebagai orang yang berliabiliti, seorang yang ditahan tetapi dilepaskan tanpa menjalani tempoh tahanan atau sekatan, seorang yang ditahan tetapi dilepaskan oleh suatu perintah kehakiman, dan seorang yang ditahan tetapi dilepaskan setelah menjalani tempoh penuh (atau sebahagian) daripada tahanan atau sekatan, tertakluk kepada proviso bahawa orang tersebut telah ditahan atau disekat setelah berkuatkuasanya Akta itu di bawah mana-mana undang-undang berkenaan dengan sebarang aktiviti yang berkaitan atau melibatkan pengedaran apa-apa dadah berbahaya.

(3) Apa-apa pembacaan atau pentafsiran s 7(1)(a)(ii) Akta itu dengan memasukkan perkataan 'sah' tidak akan termasuk kategori kedua di atas dan memberinya maksud yang lebih terhad. Bahasa dalam s 34 Akta itu adalah jelas dan tidak taksa, iaitu dalam prosiding di bawah Akta itu, Akta itu perlu ditafsirkan untuk memberi kesan kepada niatnya. Adalah jelas bahawa tafsiran kehakiman atau apa-apa tafsiran yang lain adalah tidak termasuk kecuali untuk memberi kesan kepada tujuan Akta itu.

(4) Setelah mengenal pasti seorang yang berliabiliti untuk ditindak terhadap sebagai seorang yang kini ditahan atau yang pada masa lalu telah ditahan, keesahan tahanannya sebagai harus ditahan bukan sahaja merupakan tafsiran kehakiman yang bertentangan dengan tujuan Akta itu, tetapi juga mempertimbangkan ketaksaan atau kelemahan bahasa, atau kecacatan atau kekurangan dalam s 7(1)(a)(ii). Itu jelas tidak dibenarkan, kerana Akta itu memberikan kepada mahkamah budi bicara yang amat kurang untuk bergantung kepada tafsiran sendirinya apabila mengendalikan terma Akta itu.]

A [*Editorial Note*: The appellant has appealed to the Court of Appeal vide Criminal Appeal No P–09–10–95.]

Notes

For cases on forfeiture under the Dangerous Drugs (Forfeiture of
B Property) Act 1988, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1292–1307.

For cases on the construction of penal statutes, see 12 *Mallal's Digest* (4th Ed) paras 1334–1348; [1990] Mallal's Digest 1160; [1991] Mallal's Digest 1908.

For cases on presumptions, see 7 *Mallal's Digest* (4th Ed, 1994
C Reissue) paras 1281–1359.

Cases referred to

Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors [1983] 2 MLJ 384 (refd)
D *PP v Tanggaah (No 2)* [1972] 1 MLJ 223 (refd)
PP v Yuvaraj [1969] 2 MLJ 89 (refd)
Ramlee & Anor v PP [1969] 1 MLJ 42 (refd)
Tang Kheng Teong & Anor v PP [1992] 2 MLJ 489 (refd)
Valliamai v PP [1962] MLJ 280 (refd)

E **Legislation referred to**

Criminal Procedure Code (FMS Cap 6) s 404(1), Ch XL
Dangerous Drugs (Forfeiture of Property) Act 1988 ss 3, 4, 5, 7(1)(a)(ii), 8, 9(1), 14, 25, 27, 28, 32(1), (2), (3), 34, 35
Dangerous Drugs (Special Preventive Measures) Act 1988
F National Land Code 1965 s 256(3)

VK Dasaratharaj (*Karpal Singh & Co*) for the appellant.
Shahidani bin Abdul Aziz (Deputy Public Prosecutor) for the respondent.

G **Jeffrey Tan JC**: The sum of RM7,500 held in two banking accounts of the appellant was seized by the respondent under the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act'). The appellant claimed the property, and under s 32(2) of the Act, the respondent then referred the claim to the sessions court for its decision, which the appellant appeals from.

H In the proceedings below, it was held that the appellant had failed to rebut the presumptions under s 35 of the Act and the property seized was accordingly ordered to be forfeited.

There are four grounds in the petition of appeal but all were abandoned save for the following issue: 'whether the appellant ceases to be a liable
I person under s 7 of the Act when he was set free by a writ of habeas corpus'.

That issue will be answered at the end of this judgment, but a dearth of authorities on the mechanism of the Act prompted a little more to be said than is absolutely necessary for the instant appeal.

The record of appeal discloses the following:

(i) the appellant was detained under the Dangerous Drugs (Special Preventive Measures) Act 1988 on 16 May 1990, but was set free by a writ of habeas corpus on 10 October 1990;

(ii) the property was seized on 17 May 1990, and the appellant's claim was made by letter dated 7 August 1990; and

(iii) the sessions court delivered its decision on 11 December 1993.

The appellant contends that his release from detention by a writ of habeas corpus *ipso facto* renders his detention void ab initio, evinces his detention as unlawful and not in accordance with law, and excludes him as a liable person under the Act. The appellant further contends that the words 'is or was detained' in s 7(1)(a)(ii) enjoin a lawful detention, and as the provisions for seizure are penal, s 7(1)(a)(ii) must be narrowly construed in his favour. In effect the appellant invites the word 'lawful' to be read to s 7.

It is said *optima est lex quae minimum relinquit arbitrio judicis,* the best law leaves least to the discretion of a judge, a law so clearly expressed and well defined as to leave the judge little room for the exercise of his own judgment or opinion; the rights and duties thereby created may at once be discerned, and the judge is approved who adheres to the terms of the law he is administering and relies as little as possible on his own views of its interpretation, meaning or intention.

The truism in that maxim is reflected in s 34 which reads:

> In any proceedings under this Act the provisions of this Act shall be construed and interpreted so as to give effect to the purposes of this Act without regard for ambiguities, or infirmities of language, or other defects or deficiencies therein, or to objections which are trivial in nature or which do not affect the merits or the substance of the issues before the court.

The purpose, inter alia, of the Act is the seizure and forfeiture of movable and immovable property connected with activities related to drug offences under the Act and the Dangerous Drugs Act 1952, or any foreign law corresponding to those Acts, and accomplished by:

(i) orders of forfeiture by the High Court (see ss 5 and 8) — a court convicting a person for an offence under s 3 or s 4 of the Act shall, under s 5, forfeit all property which is the subject of that offence or which has been used for the commission of that offence and, under s 8, the Public Prosecutor has the liberty to apply to the High Court for the forfeiture of properties which the Public Prosecutor has reason to believe are illegal properties held by any person whom the Public Prosecutor has reason to believe is a liable person;

(ii) seizure and forfeiture without the institution of any proceedings for the prosecution for an offence under the Act and without an application to court (see s 32(1));

(iii) seizure by the Public Prosecutor of movable property, a business and immovable property (see ss 25, 27 and 28), and its automatic forfeiture under s 32(1) immediately upon the expiration of three months from

A the date of seizure, unless a claim is lodged within three months from the date of seizure in accordance with s 32(2); and

(iv) forfeiture on a decision of the sessions court after its disposal of a claim under s 32(2) (see s 32(3)).

B The appellant's claim to the sessions court was undeniably a proceeding regulated by s 35 of the Act which reads:

> Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, the court shall presume that person to be a liable person and that property to be illegal property, unless the person
> C proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the Public Prosecutor shall have the right to rebut the same.

The Act, however, is silent as to the procedure applicable to a reference to the sessions court under s 32, although for applications to the High Court
D the procedure is specifically provided in s 8.

This absence of an explicit procedure in s 32 references was highlighted in *Tang Kheng Teong & Anor v PP* [1992] 2 MLJ 489 where Vincent Ng JC (as he then was) held that procedural requirements similar to s 8 should be adopted in s 32 references.

E References under s 32 should take further cue from s 14 which stipulates that all proceedings under Pt III of the Act shall be dealt with by the High Court in the exercise of its criminal jurisdiction and the law relating to criminal procedure in the High Court shall apply to such proceedings, subject to the modifications prescribed in Pt III or regulations made under the Act.

F Nonetheless, for that adoption of criminal procedure not to be perfunctory, an application under s 8 or s 32, regulated by criminal procedure, is provable, not proved or disproved according to the law of evidence relating to criminal proceedings.

G In criminal proceedings, the burden is always on the prosecution to commence and furnish the required proof. However, in proceedings under the Act, there is a subtle twist to that burden:

(a) notice to the person proceeded against to show cause is only issued after the Public Prosecutor has satisfied the court that its application
H fulfils the requirements of s 8;

(b) the issuance of a notice to show cause evinces the facts disclosed by the Public Prosecutor warrant a forfeiture of the property identified, unless otherwise rebutted;

(c) from the onset until the conclusion of proceedings under the Act
I (defined as any proceedings under the provisions of the Act) courts must presume: (i) the person proceeded against to be a liable person; and (ii) the property to be illegal property, unless by admissible evidence the contrary is proved, and the person proceeded against is required to rebut those presumptions on a balance of probabilities

(see *PP v Yuvaraj* [1969] 2 MLJ 89), in that he is not a liable person under s 7 or the property is not illegal property; and

(d) unquestionably, the presumptions give the Public Prosecutor more than just a head start, for without more it fulfils all proof required for a forfeiture order, and any further proof would be extraneous unless the Public Prosecutor intends to rebut any evidence adduced by the person proceeded against.

The corollary of the above is that the Public Prosecutor would have discharged the onus on him by filing the affidavits complying with s 8, and at the inquiry the onus would be shifted to the person proceeded against to commence and show by admissible evidence a cause to the contrary. Any claimant who fails to furnish any proof or proof to the contrary would not have discharged the burden, and the property seized would be forfeited.

Upon receipt of notice, the person proceeded against is 'to show cause why' as in s 9(1) and 'prove to the contrary' as in s 35. Those two expressions, although worded quite differently are nevertheless not unlike for they are essentially 'show cause proceedings', the character of which bears a remarkable similarity to the procedure on forfeiture of bonds in Ch XL of the Criminal Procedure Code (FMS Cap 6) ('the CPC').

Section 404(1) of the CPC provides that the court 'may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid', enunciated in the following authorities.

In *Valliamai v PP* [1962] MLJ 280, Ong J (as he then was) said that forfeiture of a bond under s 404(1) of the CPC is a question to be dealt with in two stages, first, has sufficient cause been shown against forfeiture, and secondly, if not, are the circumstances such that the whole sum of the penalty ought to be enforced.

This two-stage approach was similarly expressed in *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384, where the Supreme Court, pronouncing the meaning of 'cause to the contrary' in s 256(3) of the National Land Code 1965, said, 'cause to the contrary' requires the court to decide whether there are circumstances sufficient to refuse the chargee's application although the charge is lawfully and validly created and the chargor's default is proved, and for a chargor to 'shew cause' either in law or equity against an application for sale, and that the court should refuse to make an order where it would be unjust to do so.

It was also held in *PP v Tanggaah (No 2)* [1972] 1 MLJ 223 that without notice to the bailor, courts act without jurisdiction and any forfeiture cannot stand.

In *Ramlee & Anor v PP* [1969] 1 MLJ 42, Abdul Hamid J (as he then was) had this to say:

> As regards the procedure I think the case of *Khor Ewe Suan & Anor v PP* [1964] MLJ 220 can be applied here. In that case, a statement in *Mallal's Criminal Procedure* (4th Ed) at p 577 was quoted with approval and the learned judge (Hepworth J) held that:

> 'In this case the court had not drawn up proceedings against the principal and the sureties under the section. It seems to me that evidence should have been led producing the actual bail bond and stating that the bailors were the persons who entered into the bond. They should then have been given an opportunity to cross-examine the witness who produced the bail bond and to show cause why their recognizance should not be forfeited. They should have been invited to go into the witness box and state their case, if they so wished, calling any further evidence which they required ...'.

Equivalent views that a person proceeded against has a right to cross-examine the deponents of affidavits was also voiced in *Tang Kheng Teong & Anor v PP* [1992] 2 MLJ 489.

Section 7 lists many categories of persons as 'a liable person', but for the instant appeal, the pertinent part reads as follows:

> (1) The following persons shall be liable to be proceeded against under this Part:
>
> (a) every person —
>
> (i) ...
>
> (ii) who is or was detained after the commencement of this Act pursuant to any order of detention or restriction made under any law, in respect of any activity relating to or involving the trafficking in any dangerous drugs:
>
> Provided that the activity forming the ground of detention took place after the commencement of this Act; ...

Released by a writ of habeas corpus, ex facie the appellant would not be 'a person lawfully detained'. However, that is not synonymous with not being a liable person. Section 7 identifies the categories of persons liable to be proceeded against and the words 'was detained' given its ordinary and prosaic meaning would rope in and embrace as a liable person:

(i) a person detained but released by the detaining authorities without him serving a term of detention or restriction; or

(ii) a person detained but released by a judicial order; or

(iii) a person detained but released after service of the full (or part) of detention or restriction,

provided that that person was detained or restricted after the commencement of the Act under any empowering written law in respect of any activity relating to or involving the trafficking in any dangerous drug.

Any reading or construction of s 7(1)(a)(ii) with inclusion of 'lawful' would shade it differently, for it will exclude category (ii) above and give it a narrower meaning than the natural impact of the words understood in its ordinary and popular context.

The language in s 34 is both clear and unambiguous in that in proceedings under the Act, the Act must be construed to give effect to its intent. While it cannot be said that judicial interpretation of the Act is prohibited, yet it must 'be construed and interpreted so as to give effect to

the purposes ... without regard for ambiguities ...'. It is explicit that judicial interpretation or any other construction is excluded save as to give effect to the purposes of the Act.

Having identified a person liable to be proceeded against as one who is currently detained or who in the past was detained, the legality of detention as *de rigueur* would not only be judicial interpretation against the purpose of the Act, but also take into account the ambiguities or infirmities of language, or defect or deficiencies in s 7(1)(a)(ii). That plainly is not allowed for the Act gives to the courts administering its terms very little discretion to rely on its own interpretation.

The appeal is therefore dismissed.

Appeal dismissed.

Reported by Sarojah Arianayagam